

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BRIAN MUSK,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. C2:13-1965-RAJ-JLW

REPORT AND
RECOMMENDATION

BASIC DATA

Type of benefits sought:

(X) Disability Insurance

(X) Supplemental Security Income – Disability

Plaintiff's:

Sex: Male

Age: 49 at application, 51 at ALJ hearing

Principal Disabilities Alleged by Plaintiff: PTSD, Anxiety, head injury, knee injury, memory loss

Disability Allegedly Began: April 1, 2009, Amended to March 17, 2010

Principal Previous Work Experience: welder, human directional (advertising sign holder)

Plaintiff Last Worked: 2010

Education Level Achieved by Plaintiff: 2 years of college, welding certificate

PROCEDURAL HISTORY – ADMINISTRATIVE

Before ALJ Verrell Dethloff:

Date of Hearing: July 27, 2012

Date of Decision: August 13, 2012

Appears in Record at: Decision AR 12-31, Hearing Transcript AR 39-49

Summary of Decision:

Claimant has not engaged in substantial gainful employment since his amended onset date. He has the severe impairments of depression, post traumatic stress disorder, personality disorder NOS, and alcohol abuse. He has non-severe impairments of trace degenerative changes in his knees, gastroesophageal reflux disease with small hiatal hernia. These impairments alone, or in combination, do not meet or medically equal a Listing. He has the Residual Functional Capacity (RFC) to perform the full range of work at all exertional levels, with nonexertional limitations. He can carry out simple and some complex tasks. He can maintain concentration, persistence, and pace throughout a normal workday. He would do best with limited contact with the public, coworkers, and supervisors. Based on this RFC, claimant can perform his past relevant work as a welder, leading to a conclusion that he is not disabled. Alternatively, the claimant is not disabled under the Medical-Vocational Guidelines (MVG).

Before Appeals Council:

Date of Decision: August 28, 2013

Appears in Record at: AR 1-6

Summary of Decision: Review Declined

PROCEDURAL HISTORY – THIS COURT

Jurisdiction based upon: 42 U.S.C. § 405(g)

Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

RECOMMENDATION OF

UNITED STATES MAGISTRATE JUDGE

(X) Remand for new determination.

SUMMARY OF RECOMMENDATION

1 The decision must be reversed, as the ALJ erred on both of the alternative findings
2 upon which he based his decision. The Commissioner has conceded there is no substantial
3 evidence to support the first of these findings: that Plaintiff can return to his previous work as a
4 welder. The second finding, that the Guidelines compel a ruling of "not disabled," is an error of
5 law. The current record is not sufficient for the court to determine whether Plaintiff is entitled
6 to benefits, so the case must be remanded. On remand, the ALJ must correct further errors as to
7 his consideration of the testimony of three physicians and a treating social worker. He must
8 then make a new determination of Plaintiff's RFC, and obtain the testimony of a vocational
9 expert to assist in determining whether Plaintiff is disabled. If he finds Plaintiff is disabled, the
10 ALJ must then determine whether alcohol abuse is a contributing factor to his disability.

11 12 STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court must set aside the Commissioner's denial of
14 Social Security benefits when the ALJ's findings are based on legal error or not supported by
15 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
16 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
17 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
18 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
19 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
20 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
21 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
22 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
23 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
24

1 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
2 must be upheld. *Id.*

3 EVALUATING DISABILITY

4 The claimant bears the burden of proving disability within the meaning of the Social
5 Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal
6 citations omitted). The Act defines disability as the "inability to engage in any substantial
7 gainful activity" due to a physical or mental impairment which has lasted, or is expected to
8 last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A),
9 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are of such
10 severity that he is unable to do his previous work, and cannot, considering his age, education,
11 and work experience, engage in any other substantial gainful activity existing in the national
12 economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th
13 Cir. 1999).

14 The Commissioner has established a five-step sequential evaluation process for
15 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
16 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
17 step five, the burden shifts to the Commissioner. *See also Valentine v. Comm'r of Soc. Sec.*
18 *Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

19 ISSUES ON APPEAL

- 20 1. Did the ALJ properly determine that Plaintiff could perform his past relevant
21 work?
- 22 2. Did the ALJ properly rely on the Medical Vocational Guidelines?
- 23 3. Did the ALJ properly reject the medical source opinions of Drs. Widlan,
24 McDuffee, and Moore?
4. Did the ALJ properly reject the opinion of Amanda Westerfield, M.S.W.?

DISCUSSION

I. Past Relevant Work and Other Employment

At Step 4 of the disability analysis, the ALJ must determine if the claimant can perform his past relevant work. 20 C.F.R. §§ 404.1520(f) and 416.920(f). The ALJ must make factual findings to support the conclusion. *Pinto v. Massanari*, 249 F.3d 840, 844-5 (9th Cir. 2001). Here, the ALJ found that Plaintiff can perform his past relevant work as a welder. AR 27. “In comparing the claimant’s residual functional capacity with the physical and mental demands of this work, I find that the claimant is able to perform it as actually performed.” AR 27. Plaintiff contends the ALJ erred by failing to provide analysis as to how he determined the mental demands of this work.

The Commissioner concedes this error, agreeing that the determination that Plaintiff could manage the mental demands of his past relevant work as a welder was unsupported by substantial evidence. (Dkt 19/10). Despite the concession, the Commissioner contends this error was harmless because the ALJ made an alternate finding of not disabled at step five based on the MVGs.

The MVGs or “Grids” “are a set of tables that direct a conclusion of disability or nondisability based on four factors: physical ability, age, education, and work experience.” *Stone v. Heckler*, 722 F.2d 464, 468 (9th Cir. 1983). The Grids are based on strength factors. *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001). The ALJ may use the MVGs in lieu of the testimony of vocational expert when the Grids accurately and completely describe a claimant’s abilities and limitations. *Reddick v. Chater*, 157 F.3d 715, 729 (1998). This applies when the claimant’s limitations are exertional, or both exertional and non-exertional, unless the non-exertional impairments are sufficiently severe to significantly limit the range of work permitted by the exertional limitations. *Hoopai v. Astrue*, 499 F.3d 1071, 1075 (9th Cir. 2007).

1 However, the plain language of the regulation precludes use of the Grids where a claimant's
2 limitations are solely non-exertional. "[W]here a person has solely a nonexertional
3 impairment(s), the table rules do not direct conclusions of disabled or not disabled." 20 C.F.R.
4 § 404, Subpt. P, App. 2 § 200.00(e)(1); SSR 85-15, *available at* 1985 WL 56857 at *1. Case
5 law confirms this restriction. *See, Lounsbury v. Barnhart*, 468 F.3d 111, 1115 (9th Cir. 2006)
6 ("Where a claimant suffers only non-exertional limitations, the grids are inappropriate, and the
7 ALJ must rely on other evidence."); *Cooper v. Sullivan*, 880 F.2d 1152, 1155 (9th Cir. 1989)
8 (The Grids do not resolve the disability question when claimant has solely nonexertional
9 limitations.); *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985) ("significant non-exertional
10 limitations such as vision impairment and the inability to carry out and remember instructions
11 will render the application of the grids inappropriate.").

12 In this case, Plaintiff has only non-exertional limitations. As a result, application of the
13 MVGs is inapposite. The ALJ erred by relying solely upon the Grids and making a
14 determination of not disabled without the testimony of a Vocational Expert. Reversal and
15 remand for further proceedings is required. In addition to the errors at steps 4 and 5, the ALJ
16 committed errors in the evaluation of medical and lay evidence. These opinions are addressed
17 below so that they are properly credited on remand.

18 II. Medical Evidence

19 The ALJ evaluates medical evidence as part of the record when determining disability. 20
20 C.F.R § 416.927(b). Rejection of a contradicted medical opinion provided by an examining
21 physician requires "specific and legitimate reasons" supported by substantial evidence in the
22 record. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The Plaintiff contends that the ALJ
23 improperly rejected the medical source opinions of examining psychologists, Drs. Widlan,
24 McDuffee, and Moore.

1 The ALJ substantiated rejection of the opinions of these medical professionals based on
2 review of the longitudinal medical record and activities of daily living. AR 23. “Drs.
3 McDuffee, Widlan, and Moore supported their opinions with clinical findings. However, they
4 did not have the opportunity to review the record as a whole, which shows highly inconsistent
5 presentation at each of their exams, and overall normal mental status when presenting to
6 counseling and case management, outside the secondary gain context.” AR 25. As a result, the
7 ALJ accorded greater weight to the mental status findings from treatment providers, rather than
8 the evaluating medical professional. AR 23. Plaintiff contends that this rejection of the medical
9 evidence lacked validity and specificity.

10 Dr. David Widlan evaluated Plaintiff and offered a medical source opinion about his
11 mental status, memory, cognition, and ability to follow directions and complete tasks. AR 437-
12 443. Dr. Widlan opined that “based on MSE [Mental Status Exam] performance and clinical
13 interview he is not capable of following moderately complex instructions.” AR 438. Plaintiff
14 has deficits in social relatedness and managing social stressors. AR 437. He has difficulty
15 following and remembering directions, completing simple tasks and regulating his emotions.
16 AR 437. Dr. Widlan further explained that Plaintiff would require additional supervision to
17 consistently perform routine tasks, struggle with task completion, and have difficulty
18 responding to normal stressors in the workplace. AR 438-9.

19 The ALJ accorded no weight to Dr. Widlan’s assessment, despite acknowledging that
20 Dr. Widlan found “significant cognitive and emotional difficulties,” and “mood lability that
21 appeared beyond his control.” AR 24. The ALJ further summarized Dr. Widlan’s findings
22 concerning Plaintiff’s struggles to follow simple directions, and impairment shown by the
23 Trails Making Test, object recall, and backwards counting. AR 24. The ALJ concluded that Dr.
24 Widlan “found that claimant would likely struggle with the normal stressors associated with

1 employment, would clearly struggle to complete tasks that are not highly routine, and would
2 clearly require additional supervision to consistently perform routine work tasks due to
3 cognitive and emotional distortions. I accord no weight to this assessment.” AR 24.

4 The ALJ also rejected the opinion provided by Victoria McDuffee, Ph.D. AR 24. The
5 ALJ cited Dr. McDuffee’s observation that Plaintiff presented as “coarse, labile, and intense”
6 with loud speech, vulgar language, and poor impulse control.” AR 24. He concluded, “Dr.
7 McDuffee gave the claimant a Global Assessment of Functioning (GAF) score of 25, and
8 opined that he would be unable to manage the social and behavioral demands of regular work.
9 I accord no weight to her assessment or opinion.” AR 24. The ALJ similarly assessed the
10 opinion of Peter Moore, Psy.D. “He opined that the claimant would have considerable
11 difficulty following even simple instructions, and would have much trouble persevering at
12 tasks. In stark contrast to notes from the claimant’s treatment providers and previous
13 examiners, he noted that the claimant ‘has good interpersonal skills in most situations’ and
14 responds appropriately in most social situations. I accord little weight to the opinions of Dr.
15 Moore.” AR 24.

16 The ALJ rejected the opinions of all three examining medical professionals, which had
17 generally consistent assessments. “An ALJ may reject an examining physician's opinion if it is
18 contradicted by clinical evidence.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 199-2000 (9th
19 Cir. 2008). However, in this case, Drs. Widlan, McDuffee, and Moore provided significant
20 clinical evidence supporting their opinions.

21 Dr. Widlan observed paranoia, anxiety, depression, labile affect, and problems with
22 memory and concentration. AR 437. He administered memory and cognition exams. Plaintiff
23 could spell “world” forward but not backward. AR 438. Plaintiff could not count backward
24 from 100 by 3’s and did not understand the instructions to count forward from zero by 7’s. AR

1 438. He could recall 3/3 objects immediately but only 1/3 after a five minute lapse. AR 438.
2 During the Trails Making Test, Plaintiff placed in the impaired range, and “he became quite
3 upset completing the simple trails and became labile before discontinuing.” AR 438. Dr.
4 Widlan concluded that this response “was clearly not due to factitious behavior. He placed in
5 the non-malingering rang on the Rey (10/15).” AR 438. These results provide significant
6 clinical support for Dr. Widlan’s opinion that Plaintiff had severe impairment in many areas of
7 cognitive and social factors. AR 439.

8 Dr. Victoria McDuffee, Ph.D. also conducted a clinical evaluation with similar results.
9 Plaintiff had difficulty with complex instructions. AR 344. He was unable to spell “world”
10 backward, and could only give marginal digit span forward and a deficient span backward. AR
11 344. According to Dr. McDuffee, these results “suggest significant issues with concentration,
12 memory and attention.” AR 344. Dr. McDuffee also observed that Plaintiff is coarse, labile,
13 and intense, with loud, vulgar language and poor impulse control. AR 344. His hygiene was
14 poor and he was malodorous. AR 344. He has a low tolerance for frustration and poorly
15 managed affect. AR 344. He has severe limitations in many aspects of social functioning. AR
16 344. Based on the testing and observation, Dr. McDuffee concluded that Plaintiff will be
17 unsuccessful with employment. “He wants to work and engages in temp jobs at times. Minimal
18 hours and intermittent work is likely the best he will ever be able to participate in. The
19 demands of daily work requirements- social demands, behavior demands, appts—would be too
20 much for him to manage.” AR 345.

21 Dr. Moore observed that Plaintiff was generally unkempt with slight body odor. AR
22 424. Plaintiff was polite and cooperative but anxious. AR 424. Plaintiff’s affect ranged from
23 tense to irritable, and he became frustrated when he had difficulty with the testing but could
24 regain his composure. AR 424. While his speech was clear and logical, it was also lengthy and

1 rambling. AR 424. Like Dr. Widlan, Dr. Moore performed several clinical tests which showed
2 impairment. For the Trails Making Test, a simple visual motor tracking task, Plaintiff was
3 slower than 99% of similarly aged peers. AR 427. He could recall four digits forward and two
4 digits backward. 424. He could spell “world” forward but gave up on the backward spelling.
5 AR 424. He could not properly calculate change from \$20 for a \$17.50 item. AR 424. After
6 completing the testing, Dr. Moore concluded that Plaintiff has low average ability to remember
7 orally presented information, and borderline to low average ability to remember visual
8 material. AR 426. Plaintiff also had “considerable difficulty on measure of simple attention
9 and working memory.” AR 427. His score on the Working Memory Index was in the
10 extremely low range, exceeded by 99% of his peers. AR 427. As a result, “although Mr. Musk
11 can understand instructions and information, he will have considerable difficulty remembering
12 even simple directions and will have much more trouble persevering at tasks and responding to
13 challenges effectively.” AR 427.

14 The results of the observation and testing by the various medical professionals are
15 consistent. Plaintiff has significant issues with memory, concentration, task completion, and
16 managing stress and emotions. Despite the ALJ’s contention, many of these issues are apparent
17 in treatment notes from regular care providers. From November 2011 to June 2012, evaluations
18 by various mental health providers reported: anxiety with restricted range of affect, impaired
19 intelligence and judgment, assessing “irritability and low frustration tolerance, mood liability,
20 and anxiety present.” (AR 529-30); depressed and irritable mood, restricted affect, and
21 impaired judgment/insight (AR 534-5); euthymic and irritable mood, illogical and tangential
22 thought process, and impaired cognition and judgment (AR 539-40); suspicious attitude, loud
23 and pressured speech, irritable mood with blunted affect, impaired cognition and judgment
24 (AR 544-5).

1 Plaintiff's case worker, Amelia Westerfield, M.S.W., described these same symptoms.
2 The ALJ selected a few examples of relatively normal functioning from a record replete with
3 examples of Plaintiff's mental impairments. "In June 2012, the claimant presented to Ms.
4 Westerfield as cooperative and friendly, with casual grooming, normal hygiene, normal
5 speech, normal psychomotor activity, restricted but appropriate affect, anxious but euthymic
6 mood, and good eye contact." AR 26. However, Ms. Westerfield's treatment notes support her
7 assessment of Plaintiff's anxiety and difficulty in social situations. AR 552 (anxious, slightly
8 blunt affect), 553 (anxiety, euthymic mood with slight blunt affect, periodic loud speech), 558
9 (anxiety, dysthymic mood with congruent affect), 559 (anxiety, symptoms impacting ability to
10 concentrate and follow daily routine, tense, anxious mood with congruent affect, loud volume),
11 561 (anxious mood with congruent affect), 562 (paranoia and anxiety, perception that he is
12 unfairly targeted, anxious mood and congruent affect), AR 566 (increasingly agitated and
13 perception that he is unfairly targeted by other tenant, difficulty understanding his role in the
14 situation, defensive, irritable mood with congruent affect), 572 (anxiety stemming from fear of
15 losing housing and perception that he is unfairly targeted, anxious mood with blunt affect, loud
16 speech), 573 (irritable mood), 576 (alcohol consumption for nerves and anxiety, speech overly
17 animated and circumstantial thought process), 577 (anxious mood, congruent affect), 578, AR
18 579 (defensive but cooperative, feeling unfairly targeted by neighbor, agitated mood and
19 affect), 586 (defensive with agitated mood, speech clear with angry tone, thought process
20 connected but illogical at times, perception that he is unfairly targeted). Ms. Westerfield's
21 treatment notes do not support the ALJ's contention that Plaintiff's regular treatment providers
22 observed normal mental status, rather than the extreme impairments described by the
23 consulting professionals. Ms. Westerfield consistently observed Plaintiff's anxiety, agitation,
24 and feelings of persecution from his fellow tenants.

1 Rather than negate the clinical observations and testing, Plaintiff's mental health
2 providers confirm the limitations and impairments diagnosed by the Ph.D./Psy.D. consultants.
3 The ALJ erred in according no weight to the medical opinions grounded in clinical testing and
4 supported by treatment notes from lay witnesses in routine contact with Plaintiff.

5 The ALJ also noted that Plaintiff's activities of daily living—especially his model
6 building and seasonal volunteer work at a farmer's market—were incompatible with the severe
7 impairments described by Drs. Widlan, McDuffee, and Moore. However, both Drs. McDuffee
8 and Moore knew of Plaintiff's attempts to work and model building hobby. AR 343, 345, 424-
9 5. Even with knowledge of these activities, both doctors opined that Plaintiff had severe
10 impairments that would prevent him from sustained employment. AR 345, 426-7.

11 The ALJ cited Plaintiff's activities of daily living and generally normal presentation at
12 his regular mental health treatment appointments to reject the consistent opinions given by
13 medical professionals after substantial clinical observation and testing. Based on the evidence
14 in the record, these reasons were not legitimate and were not based on substantial evidence.
15 Rejection of these medical evaluations was error.

16 III. Lay Witness

17 Plaintiff assigns error to the ALJ's assessment of his case manager, lay witness
18 Amanda Westerfield, M.S.W. "In determining whether a claimant is disabled, an ALJ must
19 consider lay witness testimony concerning a claimant's ability to work." *Stout v. Comm'r of*
20 *Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). This includes evidence from private
21 and public social welfare agency personnel. 20 C.F.R. 404.1513(d)(3). The ALJ may disregard
22 evidence from these lay sources after providing a germane reason for each of the witnesses.
23 *Turner v. Comm'r of Soc.Sec. Admin.*, 613 F. 3d 1217, 1224 (9th Cir. 2010).

1 Ms. Westerfield submitted both an assessment and letter detailing her opinion of
2 Plaintiff's mental health and limitations. AR 522-26. Ms. Westerfield states that Plaintiff has
3 mental health symptoms of depressed mood, anxiety, irritability and outbursts of anger,
4 hypervigilance, exaggerated startle response, difficulty concentrating, and insomnia. AR 522.
5 She continues, "Mr. Musk tends to present as irritable and guarded, which impairs his ability to
6 engage in socially appropriate behavior with others." AR 522. She reports observations of
7 verbal altercations with neighbors and peers, and misinterpretations during interactions with
8 fellow tenants and staff members of his housing facility. He becomes confused and upset. He
9 can become overwhelmed and frustrated under pressure leading to verbal aggression toward
10 others. AR 522. Ms. Westerfield also observed marked limitations in memory, and ability to
11 understand, remember, and carry out detailed instructions. AR 523. Plaintiff's "concentration,
12 memory, and understanding are short-term and often disrupted. Completing tasks and
13 following instructions are difficult without guidance. He forgets verbal instructions quickly; he
14 needs things written down." AR 526.

15 The ALJ accorded no weight to Ms. Westerfield's lay opinion. AR 25. To reject the
16 evidence, the ALJ cited Ms. Westerfield's treatment notes reflecting intact cognition on mental
17 status exam and behavior that is not consistent with extreme social limitations. AR 26. The
18 ALJ further states that Ms. Westerfield's notes indicate that Plaintiff is stable and managing
19 symptoms, spends significant time on airplane models, and has a volunteer job which are all
20 inconsistent with the alleged cognitive and social limitations. AR 26. Also, Ms. Westerfield's
21 notes do not reflect persistent difficulties interacting with neighbors or Plaintiff's alcohol use
22 and its impact on his limitations. AR 26. The Plaintiff contends these reasons are not specific
23 and germane as required to reject lay witness opinion.

1 Once again, the ALJ selects a few examples of relatively normal functioning from a
2 record replete with examples of Plaintiff's mental impairments. "In June 2012, the claimant
3 presented to Ms. Westerfield as cooperative and friendly, with casual grooming, normal
4 hygiene, normal speech, normal psychomotor activity, restricted but appropriate affect, anxious
5 but euthymic mood, and good eye contact." AR 26. However, Ms. Westerfield's treatment
6 notes support her assessment of Plaintiff's anxiety and difficulty in social situations. AR 552
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15 anxious mood with blunt affect, loud speech), 573 (irritable mood), 576 (alcohol consumption
16 for nerves and anxiety, speech overly animated and circumstantial thought process), 577
17 (anxious mood, congruent affect), 578, AR 579 (defensive but cooperative, feeling unfairly
18 targeted by neighbor, agitated mood and affect), 586 (defensive with agitated mood, speech
19 clear with angry tone, thought process connected but illogical at times, perception that he is
20 unfairly targeted). The notes show significant anxiety as well as feelings of persecution and
21 misunderstanding resulting from interactions with fellow tenants. These are precisely the
22 mental health issues described by Ms. Westerfield. As a result, the ALJ's reasons for rejecting
23 Ms. Westerfield's opinion were not supported by substantial evidence.

24 IV. Disposition

1 Reversal is, therefore, required. The decision whether to remand for additional
2 evidence or simply to award benefits is within the Court's discretion. *Reddick*, 157 F.3d at 728.
3 A remand for award of benefits is appropriate when each part of the three-part credit-as-true
4 standard is satisfied. *Garrison v. Colvin*, --- F.3d ---, 2014 WL 3397218 at *20 (9th Cir.
5 2014). The requirements are:

6 (1) the record has been fully developed and further administrative proceedings
7 would serve no useful purpose; (2) the ALJ has failed to provide legally
8 sufficient reasons for rejecting evidence, whether claimant testimony or medical
9 opinion; and (3) if the improperly discredited evidence were credited as true, the
10 ALJ would be required to find the claimant disabled on remand.

11 *Id.*

12 Because the record in this case is incomplete, the court must remand for further
13 proceedings. Upon remand, the ALJ should credit the previously rejected medical and lay
14 witness evidence and incorporate the opinions into a new RFC. After establishing an RFC that
15 accurately reflects the Plaintiff's capacity, the ALJ should solicit testimony from a Vocational
16 Expert as to Plaintiff's employability. If, upon remand, the ALJ finds that plaintiff is disabled,
17 he must then determine whether plaintiff's alcohol abuse is a contributing factor to his
18 disability, as required by 20 C.F.R §§ 404.1535, 416.935 and *Bustamante v. Massanari*, 262
19 F.3d 949, 955 (9th Cir. 2001).

20 CONCLUSION

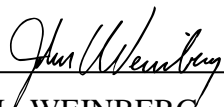
21 For the foregoing reasons, the Court recommends that this case be REVERSED and the
22 case REMANDED for further proceedings. A proposed order accompanies this Report and
23 Recommendation.

24 Objections to this Report and Recommendation, if any, must be filed with the Clerk
and served upon all parties to this suit no later than fourteen (14) days after the date on which
this Report and Recommendation is signed. If no timely objections are filed, the Clerk shall

1 note this matter for the earliest Friday after the deadline for objections, as ready for the
2 Court's consideration. Failure to file objections within the specified time may affect a party's
3 right to appeal.

4 If objections are filed, any response is due within fourteen (14) days after being served
5 with the objections. A party filing an objection must note the matter for the court's
6 consideration fourteen (14) days from the date the objection is filed and served. Objections
7 and responses shall not exceed twelve pages.

8 DATED this 16th day of September, 2014.

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13 JOHN L. WEINBERG
14 United States Magistrate Judge
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